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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 644

THEODORE J. CHAPIN and ADAM SYDLIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

THEODORE J. CHAPIN and ADAM SYDLIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners, Theodore J. Chapin and Adam Sydlik respectfully request that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit, entered in the above case on June 27, 1958, affirming the judgment of the District Court for the Southern District of California, Central Division, pursuant to a motion for a summary judgment, dismissing the complaint of the petitioners.

Opinions Below.

The Honorable Benjamin Harrison, District Court Judge in the District Court of the United States, Southern District, Central Division, made no written memorandum opinion respecting his order, but did, on the 14th day of January, 1957, grant the motion of the United States of America for a summary judgment [R. 23]. The judgment was docketed and entered on January 25, 1957 [R. 29]. The case is not reported.

The opinion of the Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court, is reported in 258 F. 2d 465, and a copy thereof is appended hereto (Appx. 2-12). A timely Petition for Rehearing was denied by the Court of Appeals without comment on the 17th day of October, 1958 [R. 93, Appx. 14].

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

The jurisdiction of this court is invoked under *Chapter 646 of the Act of June 25, 1948, 62 Stat. 928; 28 U. S. C., Section 1254(1).*

The judgment of the Court of Appeals for the Ninth Circuit is filed and entered on June 27, 1958 [R. 92; Appx. 13]. The Opinion of the court is dated and filed June 30, 1958 [R. 91; Appx. 12]. The order denying the petition for rehearing by the Court of Appeals for the Ninth Circuit is dated and was entered on October 17, 1958 [R. 93].

The District Court found that it had jurisdiction pursuant to Title 28 U. S. C., Section 1346(b) for the purpose of ruling on the motion for summary judgment [R. 24, F. I] and, accordingly, made its judgment which was docketed and entered on January 25, 1957 [R. 30].

On February 26, 1957, petitioners filed their Notice of Appeal to the Ninth Circuit Court of Appeals [R. 37].

The Court of Appeals had jurisdiction pursuant to the provisions of 28 *U. S. C.*, Section 1291, the Order of Court being a final judgment. (*Bee Machinery Co. v. Freeman*, 319 U. S. 448, 63 S. Ct. 1146, 87 L. Ed. 1509.

Questions Presented for Review.

First Question.

Whether the Court of Appeals erred in holding that the duties of a member of the Armed Forces had not commenced so as to subject the United States of America to liability under the provisions of the *Tort Claims Act*, 28 U. S. C., Sections 1346(b), 2671 and 2674, where such member of the Armed Forces is transferred from one permanent duty station to another by competent orders authorizing travel by private automobile, providing for reimbursement of travel expense, directing that travel is necessary in the military service, specifying the time of departure and arrival and where the member of the Armed Forces is proceeding in his automobile to the new station as directed without deviation.

Second Question.

Whether the District Court and Court of Appeals ignored the application and policy considerations of the Federal Tort Claims Act and the decision of this court in the Second *Williams* case, *Williams v. United States*, 350 U. S. 857, 76 S. Ct. 100, 100 L. Ed. 761.

Third Question.

Whether the District Court and the Court of Appeals applied the local law relating to scope of employment in conflict with applicable local decisions.

Fourth Question.

Whether or not under the stipulated facts and the findings of the court (if findings are proper) a genuine issue of fact was tendered, such that the motion for summary judgment of the Respondent should not have been granted under the provisions of Title 28 U. S. C., Section 56(c).

Statement of the Case.

A. The Action and Pleadings.

The original complaint of Petitioner, Theodore J. Chapin, was filed on May 22, 1956, in the District Court of the United States, Southern District of California, Central Division, alleging jurisdiction of the District Court by reason of the provisions of Chapter 646 of the Act of June 25, 1948, 62 Stat. 933, as amended; 28 U. S. C., Section 1346(b). By said complaint the Petitioner sought recovery for personal injuries resulting from the negligent acts on April 6, 1956, of one PFC Herman H. Frehe, a soldier in the United States Army, while traveling under orders to a permanent duty station, which acts occurred on a United States highway in the State of California [R. 3].

The complaint of Petitioner, Adam Sydlik, was filed on June 26, 1956, in the same court and made substantially the same allegations as those set forth in that of Theodore J. Chapin [R. 7].

Both of the complaints alleged that Frehe was at all times mentioned in the complaint an employee, servant and agent of the United States Government, and did at all times mentioned therein act within the scope and course of his employment and agency. The complaints allege the private ownership of the automobile being driven by Frehe,

the negligent operation of said automobile, and the injuries to Petitioners.

The United States of America filed separate answers which admitted that Herman H. Frehe was at all times set forth in the complaints a member of the United States Army, and the use of the private automobile by Herman H. Frehe, but specifically denying that Frehe was the employee, servant, or agent, of the United States, acting within the course and scope of his employment at the times in question or with the express consent and knowledge of the United States at the time and place [R. 12-18].

The matters were consolidated by stipulation and order on the 23rd day of October, 1956 [R. 19].

Thereafter, a motion for summary judgment was made by the United States of America upon the ground that there was no genuine issue as to any material fact on the question of jurisdiction (Scope of employment requirement of Sec. 1346(b) of Title 28 U. S. C. [R. 22]). A stipulated set of facts having been arrived at [R. 31-36, 47, 48, 49], the court made its order granting the motion on January 14, 1957 [R. 23].

B. The Hearing on the Motion for Summary Judgment.

Notwithstanding the findings of fact on file herein, petitioner sets forth with some detail the matters occurring at the hearing in view of the provisions of Rule 52(a) of Title 28. The court is free to consider the stipulated facts and reach its own conclusions untrammeled by a District Court's findings and conclusions of law in any event. (*Wigginton v. Order of United Commercial Travelers of America*, 126 F. 2d 659, *cert. den.*, 63 S. Ct. 28, 317 U. S. 636, 87 L. Ed. 513.)

At the hearing on January 14, 1957, the District Court was presented with copies of joint travel regulations for the Armed Forces respecting permanent change of station. In addition, there was read into the record from joint travel regulations, Chapters 36 and 38, Part B, Section 3050, the following.

> "Part B, 3050—Travel Status: (1) Importance of Travel Status. Members are entitled to travel and transportation allowances as authorized in accordance with existing regulations, only while actually in a 'travel status.' They shall be deemed to be in a travel status while performing travel away from their permanent duty station, upon public business, pursuant to competent travel orders, including necessary delays enroute incident to mode of travel and periods of necessary temporary or temporary additional duty" [R. 48, 49].

The court in its discussion stated that it felt that *McVicar v. Union Oil Co.* (1956), 138 Cal. App. 2d 370, 292 P. 2d 48, was the controlling California case and that the courts of California by reason of that case had adopted the doctrine laid down in North Carolina by the court in the cases of *United States v. Sharpe* (4 Cir.), 189 F. 2d 239, and *United States v. Eleazer* (4 Cir.), 177 F. 2d 914 [R. 46, 51]. The court stated, however, that there are cases in California prior to the time of *McVicar* holding to the contrary [R. 50]. Petitioners pointed out to the court that the *Sharpe* and *Eleazer* cases were simply dicta and not necessary to the ruling of the court in the *McVicar* case [R. 57].

The court also stated that it was of the opinion that there would be no question (*i.e.*, in holding for petitioners) if the law of Washington were involved, in view of the

decision in the Ninth Circuit in the case of *United States v. Kennedy*, 230 F. 2d 674, factually on all fours with the case of the petitioners [R. 54].

The court stated [R. 44, 45] that it would not go into the questions of negligence or injury and further stated it would be fine if the Circuit Court of Appeals would disagree with Judge Parker (the judge who had decided the *Sharpe* and *Eleazer* cases) so that there would be a conflict in the Circuit Courts and the Supreme Court could then pass upon the question [R. 52]. He further invited an appeal on this matter in order to clarify the law as to the Federal Tort Claims Act [R. 45].

The nub of the District Court's decision, so far as the *McVicar* case is concerned, appears to be that California adopted the rulings of Judge Parker in *Sharpe* and *Eleazer* to the effect that the government was not in control of the instrumentality being operated because it was the car owned by the soldier [R. 51]. The fact that there is not one single California case in the State Supreme Court or in the District Courts of Appeal, including the *McVicar* case, which has held that the test of scope of employment is control of the actual instrumentality, was pointed out to the District Court [R. 52-53].

There was also introduced in evidence pleadings and findings in the matter of *Kennedy v. The United States* in the United States District Court of the Western District of Washington, Northern Division, which was affirmed in the *Matter of United States v. Kennedy* (9 Cir.), 230 F. 2d 674 [R. 60-73], for the purpose of showing the similarity of the factual situation and how the District Court in Washington had held in that situation.

C. The Facts and the District Court's Findings and Judgment.

The facts and the findings in the instant case were as follows:

That Herman H. Frehe was a Private First Class, United States Army, and an employee of the United States of America [Stip. V. R. 32; F. VI, R. 25]; that he had been assigned to Company C of the 819th Engineering Aviation Battalion, stationed at Norton Air Force Base, San Bernardino, California; that prior to April 4, 1956, Company C 819th Engineering Aviation Battalion was disbanded and the personnel thereof reassigned to new units at various duty stations [Stip. VI, R. 32; F. VII, R. 25]: that on March 28, 1956, Frehe was released from assignment to Company C 819th Engineering Aviation Battalion and reassigned to Headquarters Company III Corps, Fort Hood, Texas, and that he was directed pursuant to said order to depart on or about the 5th day of April, 1956, from Norton Air Force Base from Fort Hood, Texas, and that the change of station was a permanent change pursuant to said order [Stip. VII, R. 32; F. VIII, R. 25-26].

It was further stipulated and found that Frehe was authorized to travel by private automobile and was authorized to receive reimbursement for travel expense in lieu of common carrier to the extent provided by Army Regulations and that he was to receive his soldier's pay at all times [Stip. VIII, R. 33; F. IX, R. 26]; that Frehe and others in his unit were under similar orders and were authorized delays enroute, chargeable as leave, from 4 to 30 days; that Frehe was authorized a 4 day delay and his leave address pursuant to said order was at Astoria, Long Island, New York, New York; that on the 10th day of

April, 1956, after the collision on April 6, 1956, new orders were issued from headquarters of the 819th Engineering Aviation Battalion, being Special Orders No. 59, paragraph 1 thereof authorizing Frehe to proceed on or about the 11th day of April, 1956, to Fort Hood, Texas, Special Orders No. 50 having been revoked with respect to his reassignment by Special Orders No. 58 on the 9th day of April, 1956 [Stip. XI. R. 34; F. XII, R. 27]; that Frehe was directly enroute from Norton Air Force Base to Fort Hood, Texas, as directed by and pursuant to said Special Orders No. 50 with another serviceman from his unit authorized to travel in like fashion, sharing expenses with him as a rider, having departed from Norton Air Force Base on April 4, 1956 [Stip. X, R. 33-34; F. XI, R. 27; Stip. IX, R. 33; F. X, R. 26]. An extract of the order was set forth, which order provided that Frehe was to be at his station, by April 12, 1956, and a list of the definitions of the abbreviations found in that order; among those definitions is the following: *"TDN"—Travel directed is necessary in the military service* [Stip. IX, R. 33; F. X, R. 26].

The court found that at all times Frehe as a member of the armed forces was subject to the orders and control of his superior officers of the United States Army in performance of his military duties [F. XIII, R. 28]. The court further found that the United States Army could, under applicable travel regulations, have forbidden PFC Frehe from traveling from California to Fort Hood, Texas, in his private automobile and could have required that he travel by rail or other means of transportation should the exigencies of the service so require [F. XIV, R. 28]. Petitioners at this point respectfully submit that Findings XIII and XIV satisfy the requirements of the California law respecting control.

In Finding XV [R. 28] the court found that the acts of Herman Frehe, as set forth in the stipulation of facts, were acts in his individual capacity in driving his own automobile and that under the law of the State of California, being the law of the place where the accident occurred, the same were not within the scope of his employment as a soldier in the United States Army.

The court then found that there was no issue between the parties as to the above facts, except as to the finding of fact set forth in Finding XV.

The court then concluded that Frehe was not within the scope of his employment and that the court had no jurisdiction to proceed further.

D. The Opinion of the Circuit Court of Appeals.

The Opinion of the Circuit Court of Appeals is analyzed herewith at some length for the purpose of argument, since employment was found and stipulated to and neither leave nor negligence were issues.

On the issue of summary judgment the court stated that there were no inferences which could be drawn by reason of the agreed set of facts [R. 84-85, Appx. 3]. However, in footnote 12 of its opinion [R. 88, Appx. 8] the court sought to distinguish *Gayton Engineering Co. v. Industrial Accident Comm.* (1950), 95 Cal. App. 2d 740, 213 P. 2d 737, on the basis that the transfer was especially beneficial to the employer, in that available labor to perform his services was in extremely short supply, and that the employee's truck which he was driving at the time of the accident was of special utility to the employer.

On the question of scope of employment the Court of Appeals determined that it should first decide if the "peculiar status" of a member of the Armed Forces should be

considered, *i.e.*, with respect to the question of the control required by the employer. The court concluded that it would not look to the relationship which a member of the Armed Forces bears to his superiors. The court stating, however, at footnote 6, *"But see 28 U. S. C. Sec. 2671,* defining 'Employee of the Government'" [R. 86, Appx. 6]. The court then states:

> "Other federal courts, in transfer cases, under the applicable state law, have faced this issue and have failed to draw a distinction based upon the *unique relationship of a soldier to his employer."* (emphasis added).

Citing for this proposition *United States v. Sharpe* (4 Cir., 1951), 189 F. 2d 239; *United States v. Eleazer* (4 Cir., 1949), 177 F. 2d 914; *Noe v. United States* (E. D. Tenn., 1956), 136 Fed. Supp. 639. Petitioners at this time would point out that in all of those cases the issue of whether or not the member of the Armed Forces was on leave was determinative of the courts' ruling and that all followed the so-called Federal Law prior to *Williams v. United States,* 350 U. S. 857, 76 S. Ct. 100, 100 L. Ed. 761, vacating *Williams v. United States* (9 Cir., 1954), 215 F. 2d 800, to the effect that the courts would look to the Federal Law to determine whether the person inflicting the injury was acting within the scope of employment.

The court, when concluding its discussion and stating that the requisite control of the employee required by the California cases does not exist makes the following statement, which to Petitioners' point of view is inherently contradictory and unintelligible in the light of *Williams v. United States,* 350 U. S. 857, 76 S. Ct. 100, 100 L. Ed. 761:

> "The government's ability to control Pfc. Frehe's movement arose not out of its status as an employer,

but by virtue of its military capacity. In our view the necessary element of control relates to the particular function for which the employee was hired and cannot be supplied by the unique military status. The soldier's obligation to hold himself ready for instant obedience to the commands of his superiors is the concern only of the Army and the Soldier, this unique obligation is totally unrelated to any conduct affecting these appellants or others similarly situated. *As an employer,* the army could not direct the manner in which Frehe drove his car or its mechanical fitness for the trip." [R. 90, Appx. 10].

The court then states that, to that limited extent Finding XIV [R. 28] is erroneous [Footnote 14, R. 90, Appx. 10].

The court then concluded quoting from *Jozwiak v. United States* (S. D. Ohio, 1954), 123 Fed. Supp. 65, 69, that the activity of traveling between permanent duty stations is merely during employment and not within the scope of employment and that Frehe's duties were to be performed at his post. That at the time the accident occurred his duties had terminated at Norton Air Force Base and had not yet begun at Fort Hood [R. 91, Appx. 11].

The court does not consider at all the question of whether or not Frehe was on travel status as required by joint travel regulations, Section 3050, Part B, in order that he be entitled to pay and allowances while traveling.

The Court of Appeals distinguishes the factually identical cases of *United States v. Kennedy* (9 Cir., 1956), 230 F. 2d 674, and *Marquardt v. United States* (S. D. Cal., 1953), 115 Fed. Supp. 160, on the ground that in *Kennedy* the government conceded scope of employment and that in *Marquardt* it was "assumed" in a "'transferred government employee'" case [Footnote 7, R. 87, Appx. 6].

The court distinguishes cases cited by petitioners as cases where duties required continual travel or on the basis that the cases were under the so-called "special errand" rule [R. 87, 88, Appx. 6].

As the basis for its governing criteria to determine the scope of employment status of "transferring employees" the court relies on *McVicar v. Union Oil Co.*, 138 Cal. App. 2d 370, 292 P. 2d 48, quoting from that case at some length and noting that the case of *United States v. Sharpe* (4 Cir., 1951), 189 F. 2d 239, is cited in *McVicar* as a case nearly in point, although in that case the soldier was not to be reimbursed for expenses.

The court then concluded, after citing the *Sharpe* case for the proposition that a soldier traveling by self-selected means, under competent orders concerned only with date of reporting, is not within scope of employment, that the basis of the *McVicar* case is

> "that the act of travel by the employee is not one subject to the employer's control as a part of the duties the employee was hired to perform. Similarly, the act of a soldier's travel on a permanent change of station is not a part of the duties for which he is engaged." [R. 89, Appx. 9].

Reasons Relied Upon for the Writ.

1. The Court of Appeals has rendered a decision in conflict with the decisions of other circuits and with the decisions of the 9th Circuit itself in cases which are factually indistinguishable from those of petitioners, by its failure to consider the special relationship of a member of the Armed Forces to his employer and by its failure to apply the applicable law of California in such factual situations, which law is identical to that in other Circuits.

2. The Court of Appeals has decided an important question of local law in a way probably in conflict with all applicable local decisions of California by holding that control of the instrumentality during the journey is required to hold an employee to be acting within the course and scope of his employment in travel situations. In addition, the holding that *United States v. Sharpe* and *United States v. Eleazer* a part of the California law is in conflict with all applicable California decisions and in violation of California law respecting the application of dicta to the law of the case.

3. The Court of Appeals, by stating that the relationship of a member of the Armed Forces to his superiors is not a part of his employment relationship, and that the relationship cannot be considered as a factor in determining scope of employment under California law of *respondeat superior,* has decided a federal question in direct conflict with the applicable decisions of this court.

4. The Court of Appeals by affirming the grant of the motion for summary judgment where several genuine issues of fact exist and (if the findings of the District Court are applicable) by ignoring Findings XIII and XIV [R. 28] has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of this court's power of supervision.

ARGUMENT.

(In Amplification of Reasons for Granting the Writ.)

I.

The Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuits and with the Decisions of the 9th Circuit Itself in Cases Which Are Factually Indistinguishable From Those of Petitioners, by Its Failure to Consider the Special Relationship of a Member of the Armed Forces to His Employer and by Its Failure to Apply the Applicable Law of California in Such Factual Situations, Which Law Is Identical to That in Other Circuits.

On April 15, 1958, the 10th Circuit in the case of *United States of America v. Mraz*, 255 F. 2d 115, held where orders similar to those now before the court were involved, on a permanent change of station, that the member of the Armed Forces using his private automobile was engaged upon the government's business in furtherance of the government's interests. On July 23, 1958, the 5th Circuit, in *Hinson v. United States of America*, 257 F. 2d 178, reversed *Hinson v. United States of America* (D. C. Ga.), 156 Fed. Supp. 831, and held that a medical officer enroute to his first duty assignment in his own private automobile, under orders almost identical to those in the case at bar, was acting within the scope of his employment in that one of his specific duties was to travel to his new station. Both of those cases cited with approval the case of *United States v. Kennedy* (9 Cir., 1956), 230 F. 2d 674. The circuit court in the *Hinson* case followed Cali-

fornia cases which the Court of Appeals in the present matter distinguishes. Those cases are:

Marquardt v. United States (S. D. Cal., 1953), 115 Fed. Supp. 160;

Purcell v. United States (N. D. Cal., 1955), 130 Fed. Supp. 882;

United States v. Wibye (9 Cir., 1951), 191 F. 2d 181;

Curcio v. Nelson Display Co. (1937), 19 Cal. App. 2d 46, 64 P. 2d 1153.

In the *Mraz* case, an Air Force Officer was travelling in New Mexico under orders changing his permanent duty assignment from California to New Mexico. The special orders authorized either transportion by commercial carrier or by privately owned conveyance and provided that the officer was to arrive at his destination on a date certain. If private transportation was used, travel time was allowed and mileage reimbursement authorized. Travel was declared to be necessary in the military service. The officer was directly en route to his new station. The court cited the applicable New Mexico law to follow the general rule of agency which holds the master liable for the acts of his servant, if the acts were done while the servant was engaged upon the master's business, with a view to further the master's interests, and did not arise wholly from some external, independent, and personal motive on the part of the servant. The court then cited *United States v. Eleazer* (4 Cir.), 177 F. 2d 914; *United States v. Sharpe* (4 Cir.), 189 F. 2d 239; and *Hinson v. United States* (D. C. Ga.), 156 Fed. Supp. 831. It distinguished both *Sharpe* and *Eleazer* on the theory that in the *Sharpe* case the member of the Armed Forces was driving his own automobile

while on deferred leave en route home, and that in the *Sharpe* case, the soldier was travelling in his own automobile from one base to another at his own expense without allowance of mileage and under a pass which imposed no duty upon him, except to report to the new base on a fixed date, and further distinguished the case before it by saying that the officer "had no leave," and, therefore, his time belonged to the government. The court then stated:

> "If the officer in our case had been travelling in a government owned vehicle under the same circumstances, there could be no doubt of the liability of the government for his act. Surely the result should be no different when he is driving his own vehicle with the express consent of the government."

In *Hinson v. United States of America* (5 Cir., 1958), 257 F. 2d 178, reversing *Hinson v. United States of America* (D. C. Ga.), 156 Fed. Supp. 831, a medical doctor was proceeding to a permanent station under the following orders:

> "By direction of the Secretary of the Army * * * following officers, * * * are ordered to active duty in grade currently held as Reserve Commissioned officers of the Army. On effective date of active duty (Ed CSA) officers will proceed from their home * * * to station shown. Travel directed is necessary in the military service. Travel by privately owned conveyance authorized. Permanent change of station unless otherwise indicated * * * CAPT. GODFREY F. WESTCOTT, 04070667, Mc USAR. Central State Hospital, Petersburg, Va. * * * EFFECTIVE DATE OF ACTIVE DUTY * * * 28 Sep 56 * * * STATION ASSIGNED, REPORTING DATE * * * Stu Det, Army Med. svc Sch. Brooke, AMC. Ft. Sam Houston, Tex. * * * report not later than 8 Oct 56."

The court considered Army Regulations AR35-3035, which petitioners believe were also in effect at the time of the accident of which they complain, and which provided as follows:

"Section I. 2.b. *Permanent change of station.*

"(1) The term 'permanent change of station' means the transfer or assignment of a service member from one permanent station to another. It includes the change from home or place from which ordered to active duty to first duty station upon

"(a) Appointment.

"(b) Call to active duty,

"* * *

"c. *Travel status.* A service member will be deemed to be in travel status while performing travel between his permanent duty stations, upon public business, pursuant to competent travel orders. * * * The travel status commences with departure from the permanent duty station and terminates with the arrival at the new permanent duty station."

"Section II. *Permanent Change of Station in United States.*

"3. General. a. *Mode elected by members.* Except for group travel, upon permanent change of station the service members may elect the mode of transportation unless travel is directed to be performed by Government conveyance in the orders. Transportation will be furnished or payment of travel allowances will be made for the mode utilized. When the member travels within the United States on a permanent change of station pursuant to competent orders (not designated 'group travel orders'), which do not direct

travel by Government conveyance, he is entitled to one of the following:

"(2) *Transportation* requests, or transportation in kind, plus a per diem in lieu of subsistence or meal tickets. If transportation requests are not available to the member at the time and place required, the member may elect reimbursement for the actual cost of transportation for the mode of transportation authorized and used plus per diem or the mileage allowance prescribed in (1) above."

The court then stated the same proposition for the Georgia law with respect to the scope of employment as that stated in the *Mraz* case for the New Mexico law.

The court then looked to the special factors characteristic of military activity and discipline, stating:

"While 'acting in line of duty,' 28 U. S. C. A. 2671, is generally equated with traditional notions of scope of employment, *Cannon v. United States*, 5 Cir. 243 Fed. (2) 71, 73, the phrase reflects that Congress had in mind, and *so must we*, the special factors characteristic of military activity and discipline." (Emphasis added.)

The court held that the right to control of the servant was the touchstone of vicarious liability, citing Georgia law for this proposition, and found that that factor was as adequately supplied in the case before it as is ever possible when driving servants are involved. It noted that under 50 U. S. C. A. 705, the Captain was accountable to the army for his actions while driving. 50 U. S. C. A. 705 provides:

"Any person subject to this code who operates any vehicle drunk, or in a reckless or wanton manner, shall be punished as a court martial may direct."

The court concluded that the indifference of the army as to route or mode of travel made no difference, since it was the right of control, not the exercise of it, that it was the important factor. The court stated:

> "In executing this order to proceed, he made use of his private automobile with the express authority of the Army. For this the Army bore the expenses which were: 'necessary in the military service.' In so doing he was not going to work. He was then engaged in the performance of one of the varied duties specifically assigned to him, receiving Army pay, subject to military discipline, and not on leave."

Thus it is clear that one Circuit Court has examined the federal statute involved herein and has determined that it was the intent of Congress that the special factors characteristic of military activity and discipline must be considered by the court in applying the local law to determine whether or not the employee was within the scope of his employment. In the present case the Court of Appeals has ignored the stipulation of facts and findings on this point and has stated that the relationship of a member of the armed forces to the military can not be considered to apply the local law. This is much more than to say that the local law of New Mexico, Washington, and Georgia, is different from the law of California. The matter which this court must settle is the fundamental approach of the courts in applying local law where members of the armed forces are involved under the Tort Claims Act. Therefore, certiorari should be granted on this ground alone.

However the law of California in the matter of *respondeat superior* is no different from the law of the other jurisdictions on the facts in the cases herein cited. Please

see *Ryan v. Farrell* (1919), 208 Cal. 200, 204, 280 Pac. 945. The law of the State of Washington is also identical. *United States of America v. Kennedy* (9 Cir., 1956), 230 F. 2d 674, 675. Thus the court is presented with a situation where the identical law of four states under identical facts has been applied in a conflicting manner by different Circuit Courts, and for this reason should grant certiorari.

II.

The Court of Appeals Has Decided an Important Question of Local Law in a Way Probably in Conflict With All Applicable Local Decisions of California by Holding That Control of the Instrumentality During the Journey Is Required to Hold an Employee to Be Acting Within the Course and Scope of His Employment in Travel Situations. In Addition, the Holding That United States v. Sharpe and United States v. Eleazer Are a Part of the California Law Is in Conflict With All Applicable California Decisions and in Violation of California Law Respecting the Application of Dicta to the Law of the Case.

If the holding of the Court of Appeals is to be construed as laying down the rule that an employee, to be found within the scope of employment, must be under the control of his employer with respect to the instrumentality used at the time of the occurence, then the Court of Appeals has erroneously construed the law of California. Petitioners challenge counsel for the United States of America to cite one case in the California Supreme Court which holds for this proposition in determining whether or not an employee is within the scope of his employment. Petitioners do not believe that *Mc Vicar v. Union Oil Company* (1956), 138 Cal. App. 2d 370, 292 P. 2d 48, relied upon by the Court of Appeals herein stands for that proposition

either. It is to be noted respecting the *Mc Vicar* case that there was no petition for rehearing in the District Court of Appeal or for hearing before the Supreme Court of California.

The *Mc Vicar* case, at page 373, has a preliminary discussion of essential characteristics of employment relationships and states that it is determined by the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed, and whether, if instructions were given, they would have to be obeyed. The court cites *Industrial Indemnity Exchange v. Industrial Accident Commission* (1940), 26 Cal. 2d 130, 135, 156 P. 2d 926; *Riskin v. Industrial Accident Commission* (1943), 23 Cal. 2d 248, 253, 144 P. 2d 16; and *Villanazul v. City of Los Angeles* (1951), 37 Cal. 2d 718, 721, 235 P. 2d 16; Labor Code, Section 3000; Restatement Agency, Section 220(1) as authority for the foregoing proposition. All of those cases, statutes and texts, are concerned only with the issue of whether or not the status or relationship of two persons is that of employee and employer, but this was not an issue in the present case as is apparent from the stipulation of facts [R. 32] and Finding VI [R. 25].

The California doctrine of *respondeat superior* is as stated in *Carr v. William C. Crowell Co.*, 28 Cal. 2d 652, 655, 171 P. 2d 5, where the court, in reversing a directed verdict for a building contractor whose employee while at work struck another employee with a hammer in a dispute arising out of the work, stated that the doctrine

> "'extends far beyond his actual or possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others, remains bound to so

> manage them that third persons are not injured by any breach of legal duty on the part of such others' while acting in the scope of their employment." (Citing cases from Connecticut, California, New York, Missouri, and expressly overruling *Stephenson v. Southern Pacific Co.*, 93 Cal. 558, 562, 29 Pac. 234.)

The *Stephenson* case had held that it was erroneous to give an instruction that if an act be done in the execution of authority given the servant by his master, and for the purpose of performing what the master has directed, then the master will be responsible, whether the wrong is done by negligence or by wanton or reckless purpose to accomplish the master's business in an unlawful manner.

Other California cases where private employee automobiles were involved have also held that control of the person and not the instrumentality is the test. See *Cook v. Sanger* (1930), 110 Cal. App. 90, 293 Pac. 794; *Curcic v. Nelson Display Co.* (1937), 19 Cal. App. 2d 46, 64 P. 2d 1153. In interpreting the *Federal Tort Claims Act*, 28 U. S. C. 1346(b), 2671, and 2674, the District Courts have held

> "that the element of control is satisfied according to California rule which looks only to control of the person and not necessarily to control of the instrumentality."
>
> *Purcell v. United States* (N. D. Cal., 1955), 130 Fed. Supp. 882, 885.

Thus, if there is an implication that control of the instrumentality is necessary to scope of employment, this is gleaned from the language of *United States v. Sharpe* (4 Cir.), 189 F. 2d 234, and *United States v. Eleazer* (4 Cir.), 177 F. 2d 914. That these cases are not necessary

to the holding of the *McVicar* case and are dicta is clear from a reading of that case. The discussion or determination of a point not necessary to the disposition of the question decisive on appeal is generally regarded as obiter dictum and not as the law of the case.

> *Allen v. California Mutual Building and Loan Association* (1943), 22 Cal. 2d 474, 489, 139 P. 2d 321;
>
> *Stockton Theaters, Inc. v. Palermo* (1957), 47 Cal. 2d 469, 474, 304 P. 2d 7.

Neither *Cook v. Sanger* nor *Curcic v. Nelson*, which were both denied rehearing by the District Court of Appeal, and refused hearing by the Supreme Court, were discussed in the *Mc Vicar* case.

In its discusion of the *Mc Vicar* case, the court of Appeals [R. 89, Appx. 9] quotes from the *McVicar* case, at page 373 as follows:

> "To put the test of the cited case, if instructions were given, they would have been obeyed."

The court itself in the *Mc Vicar* case, at page 372 states:

> "but the essential element of the right to exercise any control over his choice of the means of getting to Spokane is here entirely absent."

Assuming, *arguendo*, that the *Mc Vicar* case properly states the law of California, it thus appears that there are several salient differences in the present case that would remove it from the scope of the *Mc Vicar* case, as follows:

1. The employee in the *Mc Vicar* case had the right to choose the place to which he would be transferred, while Frehe did not. In this regard, it has long been held by the office of the Comptroller General that no right for

reimbursement for travel expenses authorized by statute, incident to an ordered change of permanent station, accrues to a member of the Armed Forces for travel by him or his dependents under a mere permission to change station, *i.e.*, where the member requests a change, 37 *Opinions of the Comptroller General* 53; *Graham v. United States of America*, 57 Court of Claims 515; 7 *Digest of Opinions of the Judge Advocates General of the Armed Forces*, page 107 (October 1957—December 1957).

2. That the employee of the *Mc Vicar* case did choose to be transferred while Frehe was ordered to a permanent change of station.

3. That the employee in the *Mc Vicar* case could leave on such a day as he desired and could arrive on such date as he wished. If he did not arrive on a particular day, he would not be paid. Frehe was required to be at his post by April 12, 1956, and to depart from California on April 5, 1956.

4. The employee in the *McVicar* case received no pay or allowance while travelling, but Frehe did.

5. The employee in the *McVicar* case received no travel and transportation allowances, but Frehe did. In order for Frehe to receive transportation and travel allowance he must have been on "travel status" which was defined as performing travel away from permanent duty station, upon public business, pursuant to competent travel orders.

Joint Travel Regulations, Part B, Sec. 3050;
Army Regulations 35-3035, Sec. I-c.

6. The employer in the *Mc Vicar* case could not order the employee to use any particular mode of transportation or forbid the use of a private automobile. The Army could direct the mode of transportation to be used by

Frehe and could forbid the use of his private automobile for the transfer [R. 75; F. XIV, R. 28].

10 *U. S. C.* 1363;

Joint Travel Regulations, Sec. 4150, Chap. 26, Sec. 4;

Army Regulations 35-3035, Sec. II-3.

7. The employee in the *McVicar* case could operate his car in any fashion or condition he chose without being responsible to his employer. Frehe could be court-martialled for reckless or wanton driving.

50 *U. S. C.* 705.

It is therefore submitted on the factual basis above set forth, that even if the Court of Appeals did not choose to look at the "unique military status" of Frehe, there can be no question but that the member of the Armed Forces was within the scope of his employment. Had the court borne in mind the special factors characteristic of military activity and discipline, there would have been no question about the element of control. Furthermore, it should be noted that both the *Sharpe* and *Eleazer* cases looked to the federal law for the purpose of determining the relationship of the government to its employees prior to *Williams v. United States*, 350 U. S. 857, 76 S. Ct. 100, 100 L. Ed. 761. How then can it be said that such law could possibly become a part of the law of the State of California, where no comparable factual situation has ever existed or likely will ever exist?

The Court of Appeals also cited *Jozwiak v. United States* (S. D. Ohio, 1954), 123 Fed. Supp. 65, 69 to accurately state the law to be "there is a clear distinction between the acts done within the scope of employment and acts merely during the employment." It is respectfully

submitted that in view of *Carr v. William C. Crowell Co.* (1946), 28 Cal. 2d 652, 171 P. 2d 5 that such has never been the law of California. The court in *Purcell v. United States* (N. D. Cal.; 1955), 130 Fed. Supp. 882, noted that the *Jozwiak* case seems to be in conflict with *Marquardt v. United States* (D. C. Cal.), 115 Fed. Supp. 160, the factual situation of the *Marquardt* case is as follows:

A civilian employee of the Corps of Engineers was proceeding pursuant to orders and was authorized to travel in his own automobile from Los Angeles to a job site in Arizona. The use of the automobile had been authorized prior to departure and the employee was to be reimbursed for such use on a mileage basis; while travelling pursuant to the orders and during the time in which he was expressly found to be on vacation, the District Court, applying the California law, found that such acts were in the scope and course of his employment. The court found that be was on official business at the time the accident occurred because the employee was being reimbursed for travelling expenses, which the Joint Travel Regulations permitted only if he were on official business. The court cited with approval, *Ryan v. Farrell,* 208 Cal. 200, 280 Pac. 945.

Please also see *Crooks v. Glen Falls Indemnity Co.* (1954), 124 Cal. App. 2d 113, 268 P. 2d 203, which hold that the test of control is satisfied where the *right to control* exists and also, *Gayton Engineering Co, v. Industrial Accident Commission* (1950), 95 Cal. App. 2d 740, distinguished by the Court of Appeals in Footnote 12 [R. 88, Appx. 8].

It is submitted that under the facts and findings all elements of control required by the California law and the *McVicar* case are present in the case of petitioners.

III.

The Court of Appeals, by Stating That the Relationship of a Member of the Armed Forces to His Superiors Is Not a Part of His Employment Relationship, and That the Relationship Cannot Be Considered as a Factor in Determining Scope of Employment Under California Law of Respondeat Superior Has Decided a Federal Question in Direct Conflict With the Applicable Decisions of This Court.

In *Williams v. United States* (9 Cir., 1954), 215 F. 2d 800, a soldier employee committed acts while engaging in personal recreation during the period he was off duty and sonal recreation during the period he was off duty and away from his army base on pass. The Court of Appeals in that case when discussing the law of California cited by the appellant therein stated at page 807:

> "The novel status of a soldier arising from his peculiar relationship with his government was clearly pointed up by emphatic language of the court in *United States v. Standard Oil of California*, 332 U. S. 301, 305, 306, 309, 310, 67 S. Ct. 1604, 91 L. Ed. 2067."

The court then went on to hold that where statutory construction of the Tort Claims Act is involved, Federal Courts apply their own standards with respect to determination of a relationship of a government to its employees. It concluded that where a military man was the alleged servant, the rule of *respondeat superior*, as applied in the orthodox master and servant cases, loses its standardized force.

This court in *Williams v. United States*, 350 U. S. 857, 76 S. Ct. 100, 100 L. Ed. 761, granted certiorari and remanded the case in order that the issue of scope of employment be determined pursuant to the law of California.

This court also held in *United States v. Aetna Casualty and Surety Co.*, 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171, that the Tort Claims Act, 28 U. S. C. 1346(b), 2671 *et seq.* indicates a Congressional Intention that the United States be treated as a private person, in respect to torts committed by its employees.

Petitioners believe it to be implicit in the above decisions of this court that the Court of Appeals must consider the "unique" relationship of a soldier to his employer in applying the local law, just as the court did in *Hinson v. United States* (5 Cir., 1958), 257 F. 2d 178.

The Court of Appeals in the present case has said that it will look at the government as a private employer but removes from consideration of the rights to control the servant those rights which arise out of the military relationship. The court does not apply any federal law to this situation nor any state law. It simply ignores the situation, and, in so doing, ignores the factual stipulations of the parties before the court, the findings of the court, and the duties of a member of the Armed Forces [Stip. XI, R. 34, F. XII, R. 28]. Please see the discussion of the Court of Appeals [Rep. 86, Appx. 6; R. 87, Appx. 7; R. 90, Appx. 10; R. 91, Appx. 11].

It is therefore respectfully submitted that by removing completely from consideration under the California law the powers which the government has by reason of the military relationship of the parties the Court of Appeals has placed itself squarely in conflict with the holding of this court in the *Williams* case. The effect of such action is to prevent any person in the 9th Circuit in a case involving similar facts from presenting any aspect of control arising out of a military relationship, and, thus, the decision of the *Williams* case is rendered ineffectual. For this reason alone, the court should grant certiorari.

IV.

The Court of Appeals, by Affirming the Grant of the Motion for Summary Judgment Where Several Genuine Issues of Fact Exist, and (if the Findings of the District Court Are Applicable) by Ignoring Findings XIII and XIV [R. 28] Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings and Has so Far Sanctioned Such a Departure by the District Court as to Call for an Exercise of This Court's Power of Supervision.

Rule 56(c), Rules of Civil Procedure of Title 28, provides for summary judgment if there is no genuine issue as to a material fact.

The Court of Appeals in its discussion of the case of *Gayton Engineering Co. v. Indus. Acc. Comm.* (1950), 95 Cal. App. 2d 740, 213 P. 2d 737, distinguishes that case by reason of certain particular benefits to the employer arising out of the employee's transfer and use of his automobile [Footnote 12, R. 88, Appx. 8]. Certainly the government would never stipulate that the use of Frehe's car to transport him was beneficial to the United States of America or that his presence at Fort Hood was beneficial to the United States. However, it is clear that such facts may be inferred from the stipulated facts and from the findings themselves. If these facts were inferred, Petitioners' case would fall squarely within the *Gayton* case, and the soldier would have to be deemed within the scope of his employment.

It could also be inferred that there was a definite benefit to the United States by reason of the benefit to the morale of the Armed Forces by permitting the use of private automobiles on transfer to a new station; that there were

other persons in Frehe's unit, who were under similar orders is clear [Stip. XI, R. 34; F. 12, R. 27]. The District Court certainly considered this to be an important factor [R. 51, 53]. Is not the holding of the Court of Appeals in *Murphy v. United States* (9 Cir.), 179 F. 2d 743, applicable where, in construing the law of California, it held that a soldier, driving an Army truck into town under authorization of his commanding officer for entertainment purposes and negligently operating the truck on his way to an Indian ceremonial, although not specifically authorized to go to the ceremonial, was within the course and scope of his employment?

It would seem then that the entire case in the reasoning of the District Court and the Court of Appeals turns on the use by Frehe of his own vehicle, but the California law is clear that the use of such vehicle with the express or implied authority of the employer will not preclude third persons from reaching the employer on the ground that such act was without the scope of employment.

Ryan v. Farrell, 208 Cal. 200, 280 Pac. 945;
Brown v. Montgomery Ward & Co., 104 Cal. 679, 286 Pac. 474;
Boynton v. McKales, 139 Cal. App. 2d 777, 292 P. 2d 952;
Cobk v. Sanger, 110 Cal. App. 90, 293 Pac. 794;
Gayton Engineering Co. v. Indus. Acc. Comm., 95 Cal. App. 2d 740, 213 Pac. 737;
Marquardt v. United States (D. C. Cal.), 115 Fed. Supp. 160;
Purcell v. United States (D. C. Cal.), 130 Fed. Supp. 882.

On appeal from motion granting summary judgment, the only issue before the court is whether the District

Court properly held that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.

Dunnington v. First Atlantic National Bank of Dayton Beach, 195 Fed. 2d 1017.

In view of the facts, the findings, of the District Court and the obvious inferences from those facts and findings, the determination of both the District Court and the Court of Appeals is contrary to the provisions of the Federal Rules and the Decisions above enunciated.

Conclusion.

We have demonstrated that there are at least four cogent reasons which, each separately, require this court to grant certiorari.

1. The conflict in the circuits respecting the fundamental approach to the application of the local law to situations involving military personnel under the Tort Claims Act and achieving a conflicting result while applying identical law of the jurisdictions to identical facts.

2. The injection into the law of California of the erroneous concept never before applied by the California courts that in travel cases, control of the instrumentality by the employer is the touchstone of vicarious liability.

3. The refusal of the Court of Appeals to look at the relationship of a military employee to the Armed Forces is squarely in conflict with this court's holding in the second *Williams* case.

4. The granting of the motion for summary judgment, where a question of fact on material issues exists, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

A federal question is involved respecting the interpretation and application of the Tort Claims Act. Substantial numbers of persons are involved in view of the activities of the Armed Forces throughout the United States and the prevalent method of permitting private automobile use in permanent change of station. The decision of the Court of Appeals appears to be contrary to the provisions of the Joint Travel Regulations for the Armed Forces and undoubtedly will be considered in opinions of the Comptroller General respecting travel allowances and by the Veterans Administration and Armed Forces on the question of line of duty and may well upset the settled law within the agencies causing unnecessary confusion and results not contemplated by the Court of Appeals when it rendered its decision.

It is to be noted that the present case has been in the courts over two years and that the number of cases under the Tort Claims Act is increasing. It is therefore respectfully suggested that direction is required from this court in order that the questions which have arisen in the present case may be resolved in future cases.

We respectfully and earnestly submit that for each of the reasons presented a writ of certiorari should issue.

Respectfully submitted,

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GREENBAUM, BAKER & ANCEL,
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Of Counsel.

APPENDIX.

United States Court of Appeals for the Ninth Circuit.

Excerpt from proceedings of Monday, June 30, 1958.

Order Directing Filing of Opinion and Filing and Recording of Judgment.

ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Theodore J. Chapin and Adam Sydlik, Appellants, vs. United States of America, Appellee.

No. 15511. June 30, 1958.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, Chief Judge, and BARNES, Circuit Judge.

BARNES, Circuit Judge:

This is an appeal from a summary judgment in two consolidated actions brought against the United States in the District Court for the Southern District of California pursuant to the Federal Tort Claims Act, 28 U. S. C. §1346(b).[1] The parties stipulated the facts concerning the issue of scope of employment, and the government obtained a summary judgment based thereon. This appeal followed.[2]

On April 4, 1956 one Herman H. Frehe, a private first class in the United States Army, was en route from Norton Air Force Base, California, to Ft. Hood, Texas, traveling in his own automobile, under competent orders

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[1] "Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[2] 28 U. S. C. §1291.

transferring him to Ft. Hood on a permanent change of station. While so engaged Pfc. Frehe became involved in an accident, in California, with an automobile driven by appellant Sydlik in which appellant Chapin was a passenger. Frehe's orders directed him to proceed on or about April 4, 1956; authorized travel by private automobile, stating that such "travel directed is necessary in the military service;" provided for four days delay en route; and directed him to report for duty at Ft. Hood April 12, 1956. On these facts the District Court determined that at the time of the accident Frehe was not acting "within the scope of his . . . employment" and therefore there was no liability upon the part of the United States for his conduct. With the case in this posture there has been no trial on the issue of negligence, the court below having determined by summary judgment that it was without jurisdiction to grant relief against the United States.

Appellants complain of two errors: First, that it was improper to grant the motion for summary judgment because there exists a serious dispute over a material fact; second, that the court erred in determining that under the applicable California law Frehe was not acting within the scope of his employment at the time of the accident.

I. Summary Judgment

We are of the opinion that the District Court was correct in granting the government's motion for summary judgment. The disputed "fact" is whether Frehe was acting within the scope of his employment at the time the accident occurred. There may be situations involving deviation from or abandonment of an employer's business from which varying inferences may be drawn; there it is

properly left to the trier of fact to determine whether the employee was or was not acting within the scope of his employment.[3] But here there are no inferences to be drawn. There is an agreed set of facts upon which the court below could rightly conclude as a matter of law the issue of scope of employment.

The issue before this Court is, therefore, whether a member of the armed services of the United States is within the scope of his employment, under the applicable California law, when traveling by private automobile on a permanent change of station pursuant to competent orders authorizing travel in this manner and providing reimbursement of expenses incurred in the course of such travel.

II. Scope of Employment

We are controlled by the California law and the issue squarely presented is whether her courts would hold that Frehe was acting within the scope of his employment at the time of the accident. Williams v. United States, 1955, 350 U. S. 857, vacating, Williams v. United States, 9 Cir., 1954, 215 F. 2d 800.

The common law doctrine of *respondeat superior* has been made a part of the statutory law of California. Cal. Civ. Code §2338.[4] Her courts have developed numerous tests, applicable in varying situations, designed to provide guides to determine whether an employee's conduct falls

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[3]Loper v. Morrison, 1944, 23 Cal. 2d 600, 145 P. 2d 1.

[4]"Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for the willful omission to fulfill the obligations of the principal."

within the ambit of section 2338. They are accurately stated in 32 Cal. Jur. 2d, Master & Servant §117:

> "The scope of employment depends on a consideration of what the servant was doing and of why, when, where, and how he was doing it. The factors to be considered include intent of the employee, the nature, time, and place of his conduct, his actual and implied authority, *the work he was hired to do*, incidental acts the employer should reasonably have expected would be done, and amount of freedom allowed the employee in performing his duties. . . . *In the last analysis, each case must be determined on its own peculiar facts and circumstances*, together with the character of the employment and the nature of the wrongful act." [Emphasis added.]

But no single relevant factor is necessarily controlling. "[T]he results reached in other decisions are helpful but not necessarily controlling. . . . In each case involving scope of employment all the relevant circumstances must be considered and weighed in relation to one another." Loper v. Morrison, 1944, 23 Cal. 2d 600, 605, 145 P. 2d 1, 3.

The general rules just stated are derived from the many hundreds of California decisions which have considered the problem of scope of employment—a status or relationship easily labeled but exceedingly difficult of definition and analysis. In order to apply these rules correctly, it is essential that the factual contexts out of which they have arisen be considered. And in this regard we are of the opinion that the decisions involving employer liability to third persons for the negligent conduct of an employee engaged in a permanent change of place of employment—

transfer cases—are the decisions most relevant and which must ultimately control the instant case.[5]

We must decide whether the peculiar status of a member of the armed services has any effect on the validity of the general rules already noted; or whether, for the purposes of *respondeat superior*, his status is to be considered similar to that of any private employee. We discern no basis in the statute waiving sovereign immunity nor in logic for making a distinction which would extend the scope and application of the doctrine of *respondeat superior* beyond that traditionally applied to private employers simply because the federal government in its military capacity finds itself in the role of employer.[6]

The exclusive jurisdiction conferred on the federal district courts by 28 U. S. C. §1346 precludes the courts of any state from ever passing upon this exact phase of the problem of scope of employment, and thereby deciding what is essentially a matter of state policy.[7] Other

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[5]Appellants premise the bulk of their arguments upon the non-transfer cases cited at notes 9 and 10, *infra*.

[6]*But see* 28 U. S. C. §2671, defining "Employee of the government."

[7]It is altogether possible that the state courts will be called upon to determine the analogous problem of traveling state government employees, but the peculiar military status here involved will probably never be before them.

Once before this same problem was before the Court, but we were then not compelled to pass on it. In Kenney v. United States, 9 Cir., 1956, 230 F. 2d 674, the factual elements were indistinguishable from the case at bar. However, the issue of scope of employment was conceded by the government and it clearly appears from the reported decision that it was given no consideration by this Court. "Since appellant admits . . . scope of employment . . ." etc. (p. 675.) Similarly, in Marquardt v. United States, S. D. Calif., 1953, 115 F. Supp. 160, scope of employment was assumed in a "transferred government employee" case. The only issue there decided was whether combining personal business with the "business" of his employer was sufficient to remove the employee's conduct from the scope of his employment.

federal courts, in transfer cases, under the applicable state law, have faced this issue and have failed to draw a distinction based upon the unique relationship of a soldier to his employer.[8] We are unable to find any significant differences in the California law of *respondeat superior* in this respect and therefore conclude that no such distinction is properly made in the instant case.

The question thus posed is whether an *employer* is liable for the negligent conduct of an employee during the period of travel from his former place of employment at which his duties have been terminated to a new place of employment at which his duties have not yet commenced. Certainly this situation is entirely unlike those in which the employee's duties require continual travel.[9] It is also dissimilar to those cases involving the so-called "special errand rule."[10] We do not consider those cases helpful or controlling.[11]

In our view the recent case of McVicar v. Union Oil Co., 1956, 138 Cal. App. 2d 370, 292 P. 2d 48, estab-

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[8]Sharpe v. United States, 4 Cir., 1951, 189 F. 2d 239; Eleazer v. United States, 4 Cir., 1949, 177 F. 2d 914; Noe v. United States, E. D. Tenn., 1956, 136 F. Supp. 639; cf. Jozwiak v. United States, S. D. Ohio, 1954, 123 F. Supp. 65.

[9]*E.g.*, United States v. Wibya, 9 Cir., 1951, 191 F. 2d 181; Loper v. Morrison, 1944, 23 Cal. 2d 600, 145 P. 2d 1; Ryan v. Farrell, 1929, 208 Cal. 200, 280 Pac. 945; Cook v. Sanger, 1930, 110 Cal. App. 90, 293 Pac. 794; compare Marquardt v. United States, S. D. Cal., 1953, 115 F. Supp. 160.

[10]*E.g.*, Purcell v. United States, N. D. Cal., 1955, 130 F. Supp. 882; Vind v. Asamblea Apostolica, Christo Jesus, 1957, 148 Cal. App. 2d 597, 307 P. 2d 85; Boynton v. McKales, 1956, 139 Cal. App. 2d 777, 294 P. 2d 733; Loos v. Boston Shoes, 1954, 123 Cal. App. 2d 564, 266 P. 2d 884; Dolinar v. Pedone, 1944, 63 Cal. App. 2d 169, 146 P. 2d 237; Barton v. McDermott, 1930, 108 Cal. App. 372, 291 Pac. 591.

[11]See Vind v. Asamblea Apostolica, Christo Jesus, 1957, 148 Cal. App. 2d 597, 307 P. 2d 85, indicating the validity of a distinction based on the "transfer" cases.

lishes the governing criteria by which to determine the scope of employment status of transferring employees.[12] In the McVicar case an employee of United Airlines was transferred from the United facilities at San Francisco to those at Spokane, Washington. In route he was involved in an automobile accident. The employee was paid at an hourly rate, therefore he was not being paid for the time spent traveling; additionally, he was traveling on his days off. However, he was at all times an employee of United and carried as such on their payroll records. He was not reimbursed for the expense of travel, nor did or could his employer specify any particular mode of transportation; however, there was evidence that the employee could have utilized his employer's transportation services without cost to himself. The First District Court of Appeal held that the employee was not acting within the scope of his employment during the time he was traveling from San Francisco to Spokane pursuant to the transfer. The court reasoned that

> "the employer had no right to control or direct [the employee] as to time, route, mode of transportation, or any feature of his going from San Francisco to

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[12]Gayton Engineering Co. v. Industrial Acc. Com., 1950, 95 Cal. App. 2d 740, 213 P. 2d 737, is also a "transfer" case. There death benefits under the Workmens Compensation Act were awarded where death of the employee occurred while traveling to his new place of employment. It may be that this case is more correctly classified as one involving continual travel. See cases cited at note 9 *supra*. Assuming it to be a true "transfer" case, we do not consider it relevant here. Among other distinguishing features, it is apparent that the transfer was especially beneficial to the employer in that available labor to perform his services was in extremely short supply. Additionally, it appears from the opinion that the employee's truck, which he was driving at the time of the accident, was also of special utility to the employer. These factors are missing from the instant case as well as from McVicar v. Union Oil Co., 1956, 138 Cal. App. 2d 370, 292 P. 2d 48, and are sufficient to distinguish the Gayton decision.

> Spokane. He could have gone in an airplane of his employer free of charge. He could have gone by bus, train, motorcycle, automobile or have flown his own private plane if he had one. He could start when he pleased, stop when he pleased and go by any route that he pleased so long as he arrived in Spokane in time to report for work on December 1. His employer not only had no right to direct him to go by any particular means of transportation but also no right to forbid him to do so. He could have driven a car with faulty or no brakes and his employer had no right to interfere. To put the test of the cited case, if instructions were given they would not have been obeyed." *Id.* at 373, 292 P. 2d at 507

The opinion then goes on to cite as "a case nearly in point United States v. Sharpe, 4 Cir., 1951, 189 F. 2d 239. Sharpe involved a soldier traveling under orders to report at a date certain, but without any allowance for expenses. The essence of the Sharpe case is that while by self-selected means with competent orders concerned only with the ultimate reporting date, a soldier is not acting within the scope of his employment in the sense required for application of the doctrine of *respondeat superior.*

We conclude the basis of the McVicar case to be that the act of travel by the employee is not one subject to the employer's control as a part of the duties the employee was hired to perform. Similarly, the act of a soldier's travel on a permanent change of station is not a part of the duties for which he is engaged. It is conduct the controll of which is beyond the terms of the employment relationship.

Appellants argue the McVicar case is inapposite because the army, so say appellants, could have prohibited

Pfc. Frehe from traveling by private automobile and could have directed that he travel by some other specific mode of transporation. This argument is not sufficient to support a conclusion that Frehe was acting within the scope of his employment at the time of the accident. The ability to control must arise out of the employment relationship.[13] The government's ability to control Pfc. Frehe's movement arose not out of its status as an employer, but by virtue of its military capacity. In our view the necessary element of control relates to the particular functions for which the employee was hired and cannot be supplied by the unique military status. The soldier's obligation to hold himself ready for instant obedience to the commands of his superiors is the concern only of the army and the soldier; this unique obligation is totally unrelated to any conduct affecting these appellants or others similarly situated. *As an employer,* the army could not direct the manner in which Frehe drove his car or its mechanical fitness for the trip.[14] The Joint Travel Regulations[15] cited by appellants neither compel nor prohibit travel in a particular manner or by a particular mode. They provide nothing more than a basis for reimbursement of expenses incurred, if the directives issued thereunder are followed. Thus the authorization to travel by private automobile was not an order and need

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[13]See Carr v. Crowell, 1946, 28 Cal. 2d 652, 171 P. 2d 5, involving an intentional tort by an employee arising out of the performance of the duties for which he was employed.

[14]To this limited extent Finding XIV to the contrary is erroneous.

[15]10 U. S. C. §1363 places the transportation of troops under the immediate supervision and control of the Secretary of the Army. 37 U. S. C. §253 authorizes travel pay and allowances pursuant to uniform regulations issued by the armed services. Sections 4150 *et seq.* of the Joint Travel Regulations are the provisions here pertinent.

not have been followed. The army's only concern was that Frehe report for duty at Ft. Hood on April 12, 1956.[16] The mode and manner of travel was purely of his own choosing and for his own benefit. Under these circumstances we can see no basis in the California decisions which compel a conclusion that the act of travel by Pfc. Frehe was within the scope of his employment so as to create liability upon the part of the government to third parties injured by Frehe's conduct.

Within the limitations of the Erie[17] doctrine, we must analyze all relevant factors to determine the course of action the highest state court would take, were it squarely presented with the issue.[18] The distinction approved in Jozwiak v. United States, S. D. Ohio, 1954, 123 F. Supp. 65, at 69, accurately states the California law as we view it:

> "There is a clear distinction between acts done within the scope of employment and acts done merely during the employment."

Pfc. Frehe's duties were to be performed at his post.[19] At the time of the accident his duties had terminated at Norton Air Force Base and had not yet begun at Ft. Hood. Unless a soldier is to be considered peculiarly different from other employees of the government for the purposes of *respondeat superior*, the activity of traveling between permanent duty stations is "merely during em-

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[16]The subsequent revocation and re-issue of Pfc. Frehe's travel orders has no material bearing upon our decision.

[17]Erie R.R. v. Tompkins, 1938, 304 U. S. 64.

[18]Barnhardt v. Polygraphic Co., 1956, 350 U. S. 198, 205, 45 Calif. L. Rev. 87 (1957).

[19]Compare Purcell v. United States, N. D. Cal., 1955, 130 F. Supp. 882.

ployment" and not within the scope of employment. As already indicated, we have found no reasonable basis in California law for such a distinction.

The decision of the District Court is *affirmed*.

(Judge Lemmon heard this case, but died before decision. The matter, therefore, has been decided by the other two members of the panel.)

(Endorsed:) Opinion. Filed June 30, 1958.

PAUL P. O'BRIEN, Clerk.

United States Court of Appeals for the Ninth Circuit.

Theodore J. Chapin and Adam Sydlik, Appellants, vs. United States of America, Appellee. No. 15511.

Judgment.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment. Filed and entered June 27, 1958.

PAUL P. O'BRIEN, Clerk.

United States Court of Appeals for the Ninth Circuit.
Excerpt from proceedings of Friday, October 17, 1958.

Order Denying Petition for Rehearing.

Upon consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellants, filed August 29, 1958, and within time allowed therefor by rule of court and valid extension thereof, for a rehearing of above cause be, and hereby is denied.